

September 14, 2018

**By Email (via David Smith and Jennifer Goodwin)**

Special Master Wendell Pritchett, Esq.  
Office of the Provost  
University of Pennsylvania  
3501 Sansom Street  
Philadelphia, PA 19104

*Re: NFL Objections Regarding Special Master Use of Appeals Advisory Panel on Appeals*

Dear Special Master Pritchett:

I write pursuant to the Court's and your directions through BrownGreer on August 29, 2018 to deem as formal objections the NFL Letters of June 28, 2018 and July 11, 2018, and providing counsel for the players, including Co-Lead Class Counsel, the opportunity to respond.

With the NFL's latest complaint that the Special Master did not consult with members of the Appeals Advisory Panel ("AAP") in determining, as a factual matter, appeals of diagnoses made through the network of Qualified Monetary Award Fund "MAF" Physicians, the NFL has tied up payment of meritorious claims to at least 23 players. These awards to Retired NFL Football Players (in excess of \$30 million) remain unpaid on the basis of an improper challenge the NFL never raised in a single appeal of these or any other Notices of Monetary Awards. Each of the NFL appeals were properly denied by the Special Master with the finding that "Appellant did not show clear and convincing evidence of error in the Claims Administrator's decision. The Special Master's decisions are factual determinations and are final and binding. The Qualified MAF Physician rendered the diagnoses in these claims in compliance with the applicable provisions of the Settlement Agreement, and the record on this appeal does not show that such diagnoses were clearly

and convincingly wrong.”<sup>1</sup> Given the unambiguous language of the Settlement Agreement providing the Court and the Special Master discretion to consult with the AAP, each of the Claims tied-up by the NFL should be immediately paid to the players together with appropriate adjustments to their awards for the months-long delay and any attorneys’ fees attendant to responding to the NFL’s bad faith challenge.

Co-Lead Class Counsel explained at length in his July 6, 2018 submission to Special Master Pritchett why the NFL’s complaints on June 28, 2018, that the AAP has not been consulted in NFL Appeals of MAF-supported Awards, is unfounded. In summary, Section 9.8 of the Settlement Agreement, entitled “Review and Decision,” provides:

The Court will make a determination based upon a showing by the appellant of clear and convincing evidence. *The Court may be assisted, in its discretion, by any member of the Appeals Advisory Panel and/or an Appeals Advisory Panel Consultant.* The decision of the Court will be final and binding. (Emphasis added).<sup>2</sup>

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<sup>1</sup> In parallel, the NFL is mounting improper objections to some of these same Notices of Monetary Awards (among others) based on the claim that those MAF diagnoses are not “generally consistent” with the BAP diagnostic criteria as a matter of law. However, in these objections the NFL is arguing that the same appeals involve “technical medical questions” about which the Special Masters must consult with the AAP. The impropriety of these other “objections” by the NFL will be addressed by Co-Lead Class Counsel and individual counsel for the Settlement Class Members through separate submissions. However, the NFL cannot in good faith argue that the appeals subject to the current submission raise “technical medical questions” on the one hand and then argue that these matters are simply questions of law when launching a separate assault on Monetary Awards based on MAF diagnoses that have been affirmed on appeal by the Special Masters.

<sup>2</sup> The Rules Governing Appeals of Claim Determinations promulgated by the Special Masters contains virtually identical language; the Rules substitute “Special Master” for “The Court.” See Rule 22. Similarly, the Order Appointing Special Masters makes equally clear that the Special Masters may, but do not need to, consult with a member of the AAP in deciding appeals “the Master(s) . . . may be assisted by any member of the Appeals Advisory Panel and/or Appeals Advisory Panel Consultant in considering appeals” and “may, in their discretion, request . . . information from the Appeals Advisory Panel and the Appeals Advisory Panel Consultants.” ECF No. 6871, p. 5 and n.3.

The Settlement Agreement makes clear that the Court (and likewise a Special Master<sup>3</sup>) has the sole discretion to decide if and when consultation with the AAP and/or the AAPC may be appropriate in considering an appeal.

The reason for this discretion in the cases of appeals of Awards, particularly those based on diagnoses by MAF physicians, is inherent in the design of the Settlement Program. The Settlement Agreement provides the specific contours of the role of the AAP in the review of Qualifying Diagnoses. Far from creating a medical-review panel charged with review and confirmation of *all* Qualifying Diagnoses (whether during the claims review process or on appeal), the parties negotiated and agreed that generalized review by the AAP of Qualifying Diagnoses is confined to specific circumstances, *i.e.*, the review of (a) pre-Effective Date diagnoses rendered in particular time windows or by particular physicians, *see* Settlement Agreement §6.4(a) (“Qualifying Diagnosis Review by Appeals Advisory Panel. A member of the Appeals Advisory Panel must review, as set forth in Section 6.4(b), Qualifying Diagnoses made prior to the Effective Date...”); and (b) the rare post-Effective Date diagnosis rendered through the BAP where the two BAP providers evaluating the Retired Player do not agree on the Qualifying Diagnosis, *see* Settlement Agreement §5.13 (“Conflicting Opinions of Qualified BAP Providers”).

That is because, for post-Effective Date claims, the Qualified MAF Physicians and BAP Providers—selected by the Claims and BAP Administrators and approved by the NFL and Class Counsel—are entrusted with determining the existence or not of a Qualifying Diagnosis. There is

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<sup>3</sup> In its Order Appointing the Special Masters, the Court expressly contemplated delegating its authority over any appeals to the Special Masters: “With respect to an appeal of a Monetary Award or Derivative Claimant Award determination, an appellant must submit an appeal to the Court. The Court may, in its discretion, refer an appeal to the Master(s). The Court or the Master(s) will decide an appeal of a Monetary Award or Derivative Claimant Award based upon a showing by the appellant of clear and convincing evidence.” ECF No. 6871.

no generalized medical panel cross-check by the AAP on post-Effective Date Qualifying Diagnoses. For post-Effective Date diagnoses, the mechanism for confirming the existence or not of a Qualifying Diagnosis is only through a physician selected and approved by the Settlement Program (and the NFL). That negotiated framework reflects the determination and agreement of the parties that Qualifying Diagnoses rendered by the party-approved BAP Providers and/or Qualified MAF Physicians are trustworthy.

The protections in place for post-Effective Date diagnoses do not end with the fact that such diagnoses are made by physicians approved by the parties and trained by the Claims Administrator. Rather, as counsel for the NFL made clear that in his response to Co-Lead Class Counsel's July 6, 2018 letter, the Claims Administrator, often in consultation with the AAP and AAPC, engages in on-going review and sometimes audit of the decisions of the Qualified MAF Physicians. *See* Birenboim July 11, 2018 letter, p. 3, n. 2. Put simply, this is not a loose group of medical providers, but a rigorously vetted, thoroughly trained and actively monitored network of trusted medical professionals.

Given the NFL's claimed right of appeal of MAF diagnoses, the NFL can hardly be heard now to complain that the Special Master has abused his discretion in deciding not to consult with a member of the AAP on medical questions. As an initial matter, the NFL neglected to raise this matter through the appeals it has continued to take of Monetary Awards supported by diagnoses by Qualified MAF Physicians. Rather, the NFL continued (and continues) to take appeals of MAF diagnoses setting forth the facts and issues that it believes provide "clear and convincing proof" that the diagnosing Qualified MAF Physician was in error. The Special Master heard the arguments of the NFL and the response by Settlement Class Members (and often Co-Lead Class Counsel) and,

upon due consideration of the record, denied each of these NFL appeals.<sup>4</sup> The NFL is entitled to no more.

The NFL's efforts in its July 11, 2018 letter to bolster its argument that the AAP must be consulted on appeals, at least where there are so-called "technical medical issues," based on the language and "legislative history" of the Settlement Agreement are unavailing. The Settlement Agreement has always provided for the discretion of the Court (and Special Masters) to consult with members of the AAP when deciding appeals. Both before and after the Settlement was "uncapped", there was no requirement that the Court or Special Masters consult with a member of the AAP in the course of deciding any appeals. Accordingly, the use of the term "Appeals" in "Appeals Advisory Panel" has always been in play, and has no greater importance now than when the parties first proposed the Settlement Agreement with a "capped" Monetary Award Fund.

Additionally, these "uncapped" amendments to the Settlement Agreement include the very sections of the Settlement Agreement discussed above which make clear the very limited scope of AAP review of claims packages to pre-Effective Date diagnoses. No provisions were added for AAP review of claims packages based on post-Effective Date diagnoses, which were to be accorded deference because the diagnoses were rendered by Qualified MAF Physicians who were approved

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<sup>4</sup> While appeals of Claims based on Qualifying Diagnoses by Qualified MAF Physicians are of a very limited nature (*see* my July 6, 2018 Letter at page 3), to the extent the Special Master needs to decide medical issues on appeal, Co-Lead Class Counsel believes that the Special Master is up to the task without consultation with a member of the AAP. The Special Master has far more sophistication than a common juror who might hear similar matters at a trial and, contrary to the NFL's argument, is more than capable to considering and deciding such issues without consultation with the AAP. Indeed, in its appeals the NFL is often just second guessing corroboration of a player's functional impairment or casting doubt on a fuller battery of diagnostic test results and personal examination by a neurologist by reference to the results of mere screening tests (such as MOCA). For a fuller discussion of the simple nature of the "issues" being generated by the NFL, Co-Lead Class Counsel refers to the discussion by individual counsel in their submission on September 12, 2018 discussing case-specific examples.

by the parties. Indeed, these “uncapped” amendments introduced the role of the Qualified MAF Physician, whose post-Effective Date diagnoses would be subject only to review by the Claims Administrator before payment because of the qualifications and selection process negotiated by the NFL. Through these provisions, the “medical integrity of the settlement,” as the NFL puts it in its opening letter, is fully ensured. No AAP review was negotiated to accompany post-Effective Date diagnoses; rather an MAF diagnosis was expected to be swiftly paid to players who receive a Qualifying Diagnosis.<sup>5</sup>

The NFL’s unfounded and hence bad faith effort to force medical panel review of post-Effective Date claims has significantly delayed payment of negotiated benefits to these 23 players (as well as any others whose claims may have since been caught up in this objection by the NFL). All of the effected claims should be paid immediately. Further, given the unfounded nature of the NFL’s actions with this challenge, each of the Monetary Awards should be adjusted to reflect the delay in payment and individual counsel should be paid fees for time dedicated to this matter.

Respectfully submitted,



Christopher A. Seeger

cc: Brad S. Karp, Esq.  
Bruce Birenboim, Esq.  
Individual Counsel (via email)  
Special Master Jo-Ann Verrier, Esq. (via David Smith and Jennifer Goodwin)

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<sup>5</sup> Accordingly, the wider pall the NFL is endeavoring to cast over post-Effective Date Claims based on scrutiny that has been given to some pre-Effective Date claims by members of the AAP or through the audit process is inappropriate. The pre-Effective Date diagnoses by unapproved diagnosing physicians stand on different footing under the Settlement Agreement.